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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications	)	
Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network Information	)	DA 98-836
and Other Customer Information	)	

PETITION FOR FORBEARANCE OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

Pursuant to Section 10 of the Communications Act, the Commission should forbear from enforcing against all wireless carriers, including broadband and messaging carriers, rules 64.2005(b)(1), 64.2005(b)(3) and 64.2009(a) and (c) which govern the use of customer proprietary network information ("CPNI") by carriers. Forbearance from these rules is especially critical in the CMRS context because CPNI use restrictions have historically been used as a tool to prevent anticompetitive behavior in the marketplace. Here, the robust CMRS marketplace eliminates any anticompetitive threat.

Each of the aforementioned rules must be forborne from because: (1) their enforcement is not necessary to ensure that the charges and practices of wireless carriers are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) their enforcement is not necessary for the protection of consumers; and (3) forbearance from their application is consistent with the public interest.

First, the Commission should forbear from applying Rule 64.2005(b)(1) to the extent it prohibits the use of CPNI to market wireless customer premises equipment ("CPE"). This rule is not necessary to ensure reasonable rates because bundled equipment offerings actually save consumers money, and the Commission has already held that the Section 208 complaint process adequately protects consumers from unreasonable commercial mobile rates. Further, this rule is not necessary to protect consumers, because consumers expect and desire one-stop shopping for wireless services and CPE. Finally, as already recognized by the Commission, the cross-marketing of CMRS and CPE advances the public interest by achieving economies of scale and encouraging competition, thereby lowering the cost for each customer.

Second, the Commission should not enforce Rule 64.2005(b)(1) to the extent that it prohibits the integrated marketing of wireless services and information services, including wireless voicemail, e-mail, and Internet access. Rule 64.2005(b)(1) is not necessary to guard against unreasonable rates because the Commission does not regulate the rates charged for information services, and CMRS carriers are non-dominant. This rule is also not necessary to protect consumers because they have indicated a great interest in purchasing mobile services that are combined with information services and expect such services. Finally, forbearance will advance the public interest because targeted marketing of such combined services is essential to the commercial success of CMRS.

Third, the Commission should forbear from enforcing Rule 64.2005(b)(3), which prohibits carriers from engaging in customer win back efforts. Because customer win back efforts lower commercial mobile rates, prohibiting such efforts will not eliminate unreasonable charges. To the contrary, the rule will lead to higher charges for commercial mobile subscribers and fewer choices for consumers. The public interest is also served by forbearance from the application of the anti-win back rule because the rule stifles competition, which is contrary to the primary purpose of the 1996 Act.

Finally, the Commission should forbear from applying two subsections of Rule 64.2009: subsection (a), which requires a customer's CPNI approval status to be shown on the "first screen" of customer service databases; and subsection (c), which requires the creation and maintenance of an electronic audit trail regarding access to a customer's CPNI. Forbearing from applying these requirements will not result in unreasonable carrier charges. In fact, if these rules are enforced, their implementation costs will inevitably lead to increased end-user rates. Further, these rules are not necessary to protect consumers, whose confidentiality is already protected by

the training, mandatory punishment, and supervisory review processes, mandated by subsections (b), (d), and (e) of rule 64.2009. These rule sections will also not serve the public interest, because their inflexible, "one-size-fits-all" approach to compliance is inconsistent with the fact that each carrier has its own, unique customer database software that can best be modified by individualized software configurations.

Consistent with the views of virtually every party that has participated in this proceeding, the Commission must, at a minimum, forbear from applying rules 64.2005(b)(1), 64.2005(b)(3), and 64.2009(a) and (c). Forbearance will lead to a more competitive telecommunications marketplace in which the American public will be offered a wider variety of reasonably priced wireless telecommunications services, information services, and CPE.

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The Personal Communications Industry Association ("PCIA"),[1] hereby respectfully submits this Petition seeking forbearance from enforcement of several specific rules adopted in the Second Report and Order in the above-captioned docket.[2] As detailed below, the three-part forbearance test outlined in Section 10 of the Communications Act of 1934, as amended ("Communications Act"), is clearly met and the FCC should forbear from applying: (1) Rule

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[1] PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

[2] *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* 13 FCC Rcd. 8061 (1998) (Second Report and Order and Further Notice of Proposed Rulemaking), ("*Second CPNI Order*" or "*Order*").

64.2005(b)(1) to the extent it prohibits: (a) the use of customer proprietary network information ("CPNI") derived from wireless services to market customer premises equipment ("CPE"), or (b) the use of such CPNI to market information services that are integral to wireless services within the same service category; (2) Rule 64.2005(b)(3) to the extent it prohibits the use of CPNI to win back customers who have terminated service; and (3) Rules 64.2009(a) and (c) to the extent they require "one-size-fits-all" alterations to a carrier's customer service software.

Forbearance from the application of the rules that are the subject of this petition is especially critical because the rules are unnecessary in the CMRS context. Prior to enactment of the 1996 Act, the Commission established CPNI use restrictions for the marketing of enhanced services and CPE.[3] Notably, these restrictions applied only to AT&T, the Regional Bell Operating Companies ("RBOCs") and GTE, in order to prevent dominant carriers from using CPNI obtained from their provision of regulated services to gain an anticompetitive advantage in the unregulated CPE and enhanced services markets.[4] Thus, the environment that brought CPNI rules into existence vastly differs from the ultra-competitive CMRS marketplace. The vibrant competition that currently exists in the CMRS market should eliminate any concern that the Commission may have here -- such as control of bottleneck facilities -- which contributed to the adoption of the CPNI rules. The Commission, however, fails to justify the new rules in the light of the long-standing, historic reason for CPNI use restrictions – abuse of market power.

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[3] *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) (Final Order) (*Computer II*), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Assn'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[4] *Id.*

In addition to concerns about anticompetitive behavior, the Commission claims that its CPNI rules are designed to protect consumer privacy.[5] The argument that consumers are protected by prohibiting advantageous (from the customer standpoint) CPNI usage is both a novel[6] and misguided approach. As explained below, the new rules do not forward consumer privacy because consumers accept and expect certain uses of proprietary network information where such use is useful to them. Therefore, the Commission must forbear from the application of Sections 64.2005(b)(1), 64.2005(b)(3), and 64.2009(a) and (c) of the Commission's rules.

I. INTRODUCTION

On February 26, 1998, the Commission released its *Second CPNI Order* which implemented Section 222 of the Communications Act. Specifically, the *Second CPNI Order*: (1) permits carriers to use CPNI, without customer approval, to market offerings related to the customer's existing service relationship with the carrier; (2) requires carriers to obtain express customer approval before they market service outside the customer's existing service relationship; (3) eliminates the *Computer III* CPNI framework and Sections 22.903(f) and 64.702(d)(3) of the Commission's rules; and (4) interprets Sections 272 and 274 to impose no additional CPNI requirements on the Bell Operating Companies. Following the issuance of the

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5 *Second CPNI R&O* at 7.

6 The *Second CPNI R&O* points out that CPNI rules were "intended to protect legitimate customer expectations of confidentiality regarding individually identifiable information." *Second CPNI R&O* at ¶ 7. However, that privacy interest only covers instances where a carrier makes CPNI available externally. To this end, the Commission recognized that "making CPNI available to all CPE vendors . . .would be inconsistent with customer expectations about confidentiality." *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 104 FCC 2d 958, 1088 (1986). Here, carriers do not seek to divulge customers' CPNI. Rather, carriers plan to use CPNI to market their own products directly to consumers.

Second CPNI Order, CTIA filed a request for deferral and clarification[7] which was followed immediately by GTE's petition for forbearance from the application of or, alternatively, for stay of the Commission's new CPNI rules.[8] In response to these filings, the Commission established a pleading cycle and received comments and reply comments on GTE's petitions and CTIA's request.[9] On May 26, 1998, PCIA[10] and twenty-five other parties filed petitions for reconsideration of the *Second CPNI Order*. The Commission has not yet taken action on these petitions.

II. THE COMMISSION MUST FORBEAR FROM ENFORCING ITS CPNI REGULATIONS UNLESS THEY ARE ABSOLUTELY NECESSARY TO ACHIEVE THE GOALS OF SECTION 10 OF THE COMMUNICATIONS ACT

A. Under Section 10, Carriers Have a Limited Burden of Proof

Section 10 of the Communications Act places an unambiguous, affirmative obligation on the Commission to forbear from enforcing its regulations and certain portions of the Communications Act where three conditions are satisfied.[11] Section 10 provides that:

> [T]he Commission shall forbear from applying any regulation or any provision of this [Act] to a telecommunications carrier or telecommunications service ... if the Commission determines that—
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or

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[7] Request for Deferral and Clarification, CC Docket No. 96-115 (filed Apr. 24, 1998) ("CTIA Request").

[8] *See* Petition for Temporary Forbearance or, In The Alternative, Motion for Stay, CC Docket No. 96-115 (filed Apr. 29, 1998) ("GTE Petition").

[9] Pleading Cycle Established For Comments On Telecommunications Carriers' Use Of Customer Proprietary Network Information And Other Information Request For Deferral And Clarification at 1, CC Docket No. 96-115, DA 98-836 (rel. May 1, 1998).

[10] See Petition for Reconsideration, CC Docket No. 96-115 (filed May 26, 1998).

[11] 47 U.S.C. § 160.

> regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; [12]
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[13]

It is apparent from the statutory language that the first two forbearance criteria are two ways of ensuring that the same public policy is served -- consumer protection -- and are proved by similar evidence (*e.g.*, by a showing that a carrier is non-dominant). Under both criteria, parties are required to show that a contested provision is "not necessary."[14] The "not necessary" language of Section 10 places an affirmative obligation on the Commission to forbear from enforcing any regulation that is not absolutely essential. In other words, mere usefulness of a regulation does not make it "necessary."[15] On numerous occasions, the Commission has

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[12] This Petition analyzes the requirements of 47 U.S.C. § 160(a) that relate to "charges" and "classifications," because they are the only two factors that are reasonably implicated by the use of CPNI. This Petition does not discuss "classifications" or "regulations" because they are not implicated by CPNI usage.

[13] *Id.*

[14] The word "necessary" must be given its plain meaning which includes "1. Absolutely essential; indispensable. 2. Needed to achieve a certain result or effect; requisite:. . . 3.a. Unavoidably determined by prior conditions or circumstances; inevitable: . . . b. Logically inevitable. 4. Required by obligation, compulsion, or convention." AMERICAN HERITAGE DICTIONARY 834 (2nd ed. 1991).

[15] Congress intended that the FCC would identify and relax regulations that would trample the deregulatory, pro-competitive spirit of the 1996 Act. The wireless industry is a prime example of how competition can flourish under light regulation. *See* Third Annual CMRS Competition Report, Federal Communications Commission (rel. June 11, 1998). Notwithstanding the success and continued growth of competition in the wireless industry, the Commission recently has significantly expanded the scope of regulation to which wireless carriers are subject. In addition to significant obligations imposed by the CPNI rules, CMRS carriers must submit Universal Service worksheets twice a year, make monthly contributions to the USF and contribute to North American Numbering Plan Administration costs. CMRS

(Continued...)

recognized that it is *unnecessary* to set up regulatory requirements to protect rate payers from carriers that do not possess market power and, as such, do not have the ability to engage in anti-competitive pricing.[16] The first two forbearance criteria are also met when other conditions, including other Commission regulations, already ensure that consumers are protected.[17] Thus, subsection 10(a) and (b) are satisfied where market or regulatory constraints protect consumers.

Consumer ambivalence or resistance to a disputed regulation is also evidence that the first two prongs of the forbearance analysis are satisfied because consumers would not oppose a rule that is necessary to protect them. However, it is counter-intuitive for the Commission to design rules in the name of consumer protection that are resoundingly disapproved of by those

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(...Continued)
carriers also must submit a Telecommunications Relay Service Fund worksheet and contribution once a year, and make annual regulatory fee payments. The CPNI rules unreasonably add burdens to the CMRS industry, which, as demonstrated herein, are unnecessary to achieve public policy goals and, in fact, are contrary to the public interest.

[16] *See Hyperion Telecommunications, Inc., Petition Requesting Forbearance*, 12 FCC Rcd 8596, 8603, 8608 (1997) (Memorandum Opinion and Order and Notice of Proposed Rulemaking) ("*Hyperion Order*") (holding that "tariffing is not necessary to assure reasonable rates for carriers that lack market power."). *See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therfor*, 95 FCC 2d 554, 578 (1983) (finding that there is "no evidence that it is in the public interest" to continue to require streamlined tariffs and 214 filings for non-dominant specialized common carriers."); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* 85 FCC 2d 1, 31 (1980) ("firms lacking market power simply cannot rationally price their services in ways which . . . would contravene Sections 201(b) and 202(a)."); *Policy and Rules Concerning Rates For Competitive Common Carrier Services and Facilities Authorizations Therefor,* 77 FCC 2d 308, 335 (1979) ("[i]f a non-dominant carrier sets its price above the market price, its competitors will seek out the competitors' lower price. The CMRS market certainly does not require a regulatory fix to protect consumers from unreasonable pricing. Every year since 1988, the industry's average monthly revenues per subscriber has fallen. Ten years ago the figure was $97.00; last year, the figure was $44.00. Cellular/PCS Market Forecast, Quarterly Survey, June 1997, Vol. 12, No. 3, Directly Derived Monthly Revenues Per Subscriber, 1988-1997, Herschel Shosteck Associates, Ltd. (Dec. 1997).

[17] *Hyperion Order* at 8609-8610 ("we can address the issue of unlawful rates through the exercise of our authority to investigate and adjudicate complaints under Section 208.").

consumers. This is particularly true with respect to CPNI rules because they purport to protect consumer privacy. In determining what is in the public interest, the Commission should not second-guess the public. If the public does not believe it needs the "protections" of the Commission's regulation, actions to the contrary are by definition outside of the public interest. Certainly, at minimum, widespread consumer dissatisfaction with a rule suggests that consumers place a higher value on the benefit achieved through its non-enforcement (for example increased competition) over any potential benefits of enforcement. Under these circumstances, the first two elements of the forbearance tests are met because it is clear that such rules are not "absolutely essential" or "indispensable."

The third prong of the Commission's forbearance analysis is the public interest showing. While this showing can cover a broad array of concerns in other contexts,[18] Section 10 explains that one of the most salient aspects of the inquiry is an assessment of the commercial impact of forbearing from enforcing certain regulations:

> The Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.[19]

As such, the public interest may be served by showing the adverse economic impact of regulation. For example, if forbearance reduces transaction costs or the administrative burdens

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[18] *Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities*, 13 FCC Rcd. 2627, 2651 (1998) ("*BOC Forbearance Petitions*") ("[t]he public interest is a broad standard, to be exercised consistent with the underlying goals of the Communications Act, as amended by the 1996 Act").

[19] 47 U.S.C. § 160(b).

on service providers and the Commission,[20] or allows the affected carriers to realize economies that have the potential to reduce prices, the public interest would be served.[21] However, economic factors are not the only relevant inquiry for a public interest determination, the Commission has observed that "Congress clearly did not intend to preclude . . . consideration of other factors."[22] Thus, an adequate public interest showing may also include evidence that forbearance serves the needs and desires of consumers.

B. The Record In This Proceeding Overwhelmingly Supports Forbearance.

As indicated above, several affected parties have sought to suspend application of the new CPNI rules.[23] While CTIA and GTE's filings were the first challenges received by the Commission, a number of other parties, including PCIA,[24] filed comment in support of GTE and

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[20] *Hyperion Order* at 8610. *See also* Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, 13 FCC Rcd 6293, 6304 (1998) (Memorandum Opinion and Order) (stating that "[f]orbearance will also eliminate a significant and unnecessary expenditure of carrier and Commission resources.").

[21] *Id.*

[22] *BOC Forbearance Petitions* at 2651.

[23] The Commission has faced a barrage of complaints concerning the clarity, usefulness, practicality, and legality of its *Second CPNI Order*. In response, the Common Carrier Bureau issued a *Clarification Order* to help address some of those issues. Implementation of the Telecommunications Act of 1996: *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information* (rel. May 21, 1998) (Order) ("*Clarification Order*"). However, the *Clarification Order* does not address the issues raised in this petition.

[24] *See* Comments of Personal Communications Industry Association In Support of GTE's Petition for Temporary Forbearance or, In The Alternative, Motion For Stay, CC Docket No. 96-115 (filed May 8, 1998). PCIA, however, seeks full rather than a temporary forbearance. This is consistent with the relief ultimately sought by GTE. GTE's temporary forbearance petition was designed to avoid implementation of the CPNI rules before the Commission acted on its Petition for Forbearance, Reconsideration and Clarification ("*Final Relief Petition*") which was filed on May 26, 1998 and, seeks full forbearance from several of the new CPNI rules.

CTIA's petitions.[25] While different procedural mechanisms were advocated by the parties to remedy the problems associated with these rules, the pleadings had one common theme—the Commission's rules should not take effect. That theme was recently reiterated in petitions for reconsideration of the *Second CPNI Order*.[26] Those petitioners nearly unanimously agreed that the CPNI rules were neither mandated by Section 222 nor supported by policy considerations. Several of the reconsideration petitions further recommended that the Commission forbear from the implementation of these rules.[27]

III. THE COMMISSION SHOULD FORBEAR FROM APPLYING THE PROHIBITION ON THE USE OF CPNI TO MARKET WIRELESS CPE

The Commission's new CPNI rules state that "[a] telecommunications carrier may not use, disclose, or permit access to CPNI derived from its provision of local service, interexchange service, or CMRS, without customer approval, for the provision of CPE and information services . . . ."[28] The rule is plainly unnecessary because the CMRS marketplace is competitive. Furthermore, as explained more fully below, the Commission should forbear from applying this new prohibition because the rule is not needed to ensure reasonable rates or protect customers and disserves the public interest.

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[25] In response to the Commission's request for comment on the CTIA and GTE petitions, twenty-one parties filed comments. Of the twenty-one parties to file, twenty supported some form of forbearance, stay, or deferral of the Commission's rules.

[26] Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding, 63 Fed. Reg. 31776 (FCC 1998).

[27] See Petitions of Ameritech, Bell Atlantic, CTIA, Comnet Cellular, GTE, National Telephone Cooperative Association, and Paging Network.

[28] 47 C.F.R. 64.2005(b)(1).

A. The Use of the CPNI to Market Wireless CPE Does Not and Cannot Affect the Reasonableness of the Carrier's Service Rates or Practices.

As demonstrated in Section II above, the only regulations that can survive scrutiny under Section 10(a) are those that are absolutely essential to ensure reasonable charges and practices. Rule 64.2005(b)(1) is precisely the type of regulation that Section 10 was designed to eliminate. PCIA submits that the CPE rule is contrary to the interests of both the marketplace and consumers. The rule is blatantly anti-consumer because, in many instances, it will lead to higher prices by effectively undermining customers' opportunities to purchase mobile services and equipment in a cost-saving bundle. Under such circumstances, application of the rule is not only "unnecessary," but contravenes congressional intent to use competition to drive down prices and spur innovation.[29] In addition, forbearance is required because the FCC has already determined that consumers are adequately protected from unreasonable rates by the Section 208 complaint process.[30]

B. Limiting the Use of CPNI to Market CPE is Not Necessary to Protect Consumers.

Although the Commission argues that Rule 64.2005(b)(1) helps protect consumers' privacy, this conclusion appears inconsistent with marketplace reality. Subscribers already expect one-stop shopping for CMRS and CPE, and anticipate that carriers will use CPNI derived from wireless services to market wireless CPE. This fact is supported by the record in this proceeding, which shows that there is a tremendous consumer demand for bundled service and

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[29] Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458 at 204-06 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 218-20 ("Joint Explanatory Statement").

[30] 13 FCC Rcd 6293, 6301 n.38 (1998) (Memorandum Opinion and Order).

equipment.[31] The importance of one-stop-shopping was even recognized and sanctioned by Congress, through its establishment of the joint marketing rules for CMRS providers in Section 601(d).

The Commission should resist creating a solution where there is no problem. So long as consumers enjoy in the benefits they incur from carriers' use of CPNI to joint market CMRS and CPE, they have either explicitly or implicitly consented to the continued use of CPNI for that purpose. Rule 64.2005(b)(1) does not protect the reasonable privacy interests of consumers because they expect a carrier to market CPE in the context of a CMRS offering. Until there is record evidence that the rules are necessary to protect consumers, forbearance will allow the Commission to avoid burdensome regulation which ultimately harms the CMRS consumer.

C. Forbearance From Enforcing Rule 64.2005(b)(1) Will Advance the Public Interest.

Forbearance from the prohibition on the use of CPNI to market wireless CPE will further the public interest because it will permit more efficient marketing through the bundling of services. As previously recognized by the Commission, bundling is an "efficient promotional device" that lowers prices for new customers.[32] Consistent with the Section 10(b) requirement that forbearance promote competition, bundling of services makes carriers more competitive by spreading fixed costs of providing the wireless service over a larger population of users, "achieving economies of scale and lowering the cost of providing service to each subscriber."[33]

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31 *See* authorities cited in the *Second CPNI Order* at n.287.

32 *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, 4030 (1992).

33 *Id.* at 4031.

Bundling further avoids the customer inconvenience of having to shop separately for CPE and CMRS.

The prohibition on the use of CPNI represents a formidable barrier to bundling because wireless carriers will not be able to use CPNI to tailor their CPE marketing to mobile service customers for whom a bundled offering would be appropriate. This inability to engage in targeted marketing places wireless carriers in an untenable situation. In particular, if a carrier elects to forego costly mass-mailings seeking customer consent, consumers might not be offered innovative combinations and the carrier could lose potential business. Alternatively, if a carrier decides to implement a sweeping campaign for consent, it will be forced to incur additional, unnecessary expenses that could undermine the carrier's profitability. What's more, the CPE rule will disrupt the CMRS industry by interfering with the industry's current and successful marketing theme – bundled offerings.

As demonstrated above, one-stop-shopping is essential for consumers and carriers alike. One-stop-marketing allows carriers to efficiently expend resources, avoid duplication of effort, and benefit from the marketing synergies of related offerings. The messaging industry, in particular, requires one-stop-marketing to jointly market equipment and services because its customers generally buy the service and lease the messaging equipment. Forbearance from the application of Rule 64.2005(b)(1) will prevent such carriers from resorting to less efficient marketing practices. Avoiding this type of anti-competitive result is consistent with the goal that the public interest examination consider "whether forbearance from enforcing [a] provision or regulation will promote competitive market conditions."[34]

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[34] 47 U.S.C. § 160(b).

IV. THE COMMISSION SHOULD FORBEAR FROM APPLYING THE PROHIBITION ON THE USE OF CPNI TO MARKET OTHER INFORMATION SERVICES THAT ARE INEXTRICABLY ASSOCIATED WITH THE UNDERLYING WIRELESS OFFERING

Rule 64.2005(b)(1) prohibits CPNI derived from CMRS to be "use[d], disclose[d] or . . . access[ed]"[35] for the marketing of information services, including call answering, voicemail or messaging, voice and retrieval services for store and forward, and Internet access services. However, as explained in more detail below, the Commission should forbear from its application of rule 64.2005(b)(1) because (i) consumer are already adequately protected and (ii) the rule does not benefit customers or advance the pubic interest.

A. Prohibiting the Use of CPNI to Market Wireless Information Services is Unnecessary to Ensure Reasonable Charges and Practices or to Protect Consumers.

Forbearance from Rule 64.2005(b)(1) is required because consumers are protected by market forces and other regulations. The information services market is characterized by intense competition that results in no carrier having the market power necessary to charge unreasonable rates or engage in unreasonable practices.[36] The intense competition in the information services market is illustrated by the fact that the Commission does not regulate rates for information services. The fact that rate regulation is unnecessary in the information services market demonstrates that the market is self-regulated. Under these facts, 64.2005(b)(1) has no safeguarding effect. Assuming *arguendo* that market power exists, there would still be adequate

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[35] *See* 47 C.F.R. 64.2005(b)(1).

[36] The Commission acknowledges this fierce competition when it states that "the level of competition within the information services market, which the Commission termed 'truly competitive' as early as 1980, has continued to increase." *In The Matter Of Computer III Further Remand Proceedings: Bell Operating Company Provision Of Enhanced Services*, 13 FCC Rcd. 6040, ¶ 36 (1998).

protection because CMRS carriers are subject to the Section 208 complaint process if they do engage in discriminatory or unreasonable behavior.

The Commission's rule is also unnecessary to protect consumers because consumers have indicated a strong desire to purchase information services that are intertwined with an underlying mobile service. Such services include wireless electronic mail, wireless Internet access, and wireless voicemail. Given that these combined services are among the fastest growing wireless service offerings, consumers *cannot* be well served by a rule that prevents carriers from using CPNI to target these services to the customers that can best use them.

B. Applying Rule 64.2005(b)(1) Will Disserve the Public Interest.

Carriers must use CPNI to target their marketing efforts to customers who are likely to purchase the product in question. Joint marketed products benefit both the carrier and the consumer. Carriers benefit because they are able to narrowly tailor their marketing efforts, which reduces costs and promotes efficiency. Consumers benefit because a wider variety of products and services are made available to them. For example, a consumer that currently has messaging service would be able to obtain voice mail or text messaging from his or her carrier when the consumer's use patterns suggest that additional service is needed.

If the Commission forbears from application of rule 64.2005(b)(1), new services could be easily added on either the customer's or the carrier's inquiry. Requiring prior consent, as the Commission's rule currently does, will only stifle targeted marketing, slow growth of the wireless market, and increase the costs to consumers by requiring broad based marketing campaigns. As such, forbearance from its application is required.

V. THE COMMISSION SHOULD FORBEAR FROM APPLYING THE PROHIBITION ON USE OF CPNI FOR WIN BACK EFFORTS

The *Second CPNI Order* further established a rule prohibiting a telecommunications carrier from "us[ing], disclos[ing] or permit[ing] access to a former customer's CPNI to regain the business of the customer who has switched to another service provider."[37] Because this rule is both anti-consumer and anti-competitive, it should not be applied to wireless carriers.

A. The Anti-Win Back Rule is Not Necessary to Ensure Just, Reasonable and Nondiscriminatory Rates and Will Actually Harm Consumers.

Prohibiting targeted win back is not necessary to protect consumers. Win back marketing represents competition in its purest, head-to-head form. Win back allows consumers to be educated about new pricing and service options, and allows consumers to play carriers off against one another. Win back plays a considerable role in the churn and competitive pricing that typifies the wireless marketplace.[38] Win back promotes lower rates by giving deep discounts to consumers.[39] Without the use of a former customer's CPNI, however, win back efforts cannot commence. Furthermore, win back efforts comport with customer expectations and desires. Consumers expect that carriers will compete for their business and that they have more leverage to negotiate a better deal once they move to another carrier.

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[37] 47 C.F.R. § 64.2005(b)(3).

[38] According to one industry report, wireless churn rates are now up to thirty percent per year in the United States and will likely climb to forty percent. In addition, thirty percent of all churn occurs within the first six months of gaining a subscriber. Among the four reasons cited for churn are: (1) competition; (2) customer migration or rotation (migration from analog to digital); (3) subscription cancellation; and (4) carrier-initiated churn (due to customer fraud, bad debt, etc.). *Andersen Consulting Communications Industry Segment Study* (August 1997).

[39] These discounts are important in the CMRS context because the majority of wireless customers base their decision to switch service on costs. *See 1997 Wireless Market Monitor*, Personal Communications Industry Association and National Family Opinion Poll, at 37 (finding that fifty-five percent of wireless customers mention price as their reason for switching services.)

B. The Anti-Win Back Provision is Anti-Competitive and Will Disserve the Public Interest.

The Commission should forbear from enforcing the anti-win back rule because it is anti-competitive, contrary to the primary purpose of the 1996 Act.[40] The anti-win back rule takes away a major tool of customer retention and violates the congressional command to balance "competitive and consumer privacy interests with respect to CPNI."[41] Because Section 10 mandates that the Commission consider "the extent to which . . . forbearance will enhance competition among providers of telecommunications services,"[42] the elimination of the anti-win back rule is justified.

VI. THE COMMISSION SHOULD FORBEAR FROM REQUIRING SOFTWARE RECONFIGURATION AND THE ADDITION OF ELECTRONIC TRACKING MECHANISMS

The *Second CPNI Order* also establishes Rule 64.2009, which details procedural rules for handing CPNI. While some of these rules appropriately balance consumer privacy protection and carrier burdens, two of the rule's five subparts are extraordinarily burdensome to carriers with minimal consumer benefit, and, as such, require Commission forbearance. Specifically, the FCC should forbear from enforcing the following rule sections: (1) rule 64.2009(a), which states that "[t]elecommunications carriers must develop and implement software that indicates within the first few lines of the first screen of a customer's service record the CPNI approval status and reference the customer's existing service subscription;"[43] and (2) rule 64.2009(c), which requires that "[t]elecommunications carriers must maintain an electronic audit mechanism that tracks

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40 See Joint Explanatory Statement.

41 Joint Explanatory Statements at 305; U.S.C.C.A.N. at 219.

42 47 U.S.C. § 160(b).

access to customer accounts, including when a customer's record is opened, by whom, and for what purpose," and must maintain these contact histories for a minimum period of one year.[44] Forbearance is required because: (1) rules 64.2009(a) and (c) will increase customers' costs, and (2) other provisions of rule 64.2009 adequately protect consumers and the public interest.

A. The Safeguards Set Out in Rules 64.2009(a) and (c) Are Not Necessary to Ensure Reasonable Rates and Practices.

Rules 64.2009(a) and (c) do not keep in check carrier's charges, and are therefore unnecessary to ensure the reasonableness of such charges and practices. To the contrary, the requirements impose a considerable financial burden on carriers. These provisions, therefore, will inevitably increase the cost of doing business for wireless carriers and rates for wireless customers. Additionally, as explained in the next section, rules 64.2009(a) and (c) are unnecessary in the light of the protections contained in other sections of rule 64.2009.

B. Enforcement of Sections 64.2009(a) and (c) Will Not Protect Consumers.

The provisions contained in Rules 64.2009(a) and (c) are unnecessary to protect customers, especially in light of the safeguards contained in the rule's other provisions related to training concerning proper CPNI use, discipline for improper use, and supervisory review of carrier compliance. First, Rule 64.2009(b) requires telecommunications carriers to train their personnel concerning the circumstances under which they are authorized to use CPNI.[45] These provisions ensure that a carrier's employees will not inadvertently access and use a customer's CPNI. Assuming that a carrier's employees want to obey the Commission's rules—and there is

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(...Continued)

43 *See* 47 C.F.R. § 64.2009(a).

44 *See* 47 C.F.R. § 64.2009(c).

45 *See* 47 C.F.R. § 64.2009(b).

no record evidence to indicate otherwise—this subpart will head off the vast majority of the problems that could potentially be associated with inappropriate use of CPNI.

Second, the rule requires carriers to establish an employee disciplinary process. Thus, Rule 64.2009(b) puts teeth into the CPNI rules and ensures that employees will be punished for the misuse of confidential information.

Third, Rule 64.2009(d) picks up where rule 64.2009(b) ends by requiring telecommunications carriers to establish a supervisory review process regarding carrier compliance for outbound marketing situations, and the maintenance of records regarding carrier compliance for a minimum period of one year. Specifically, sales personnel must obtain supervisory approval of any proposed outbound marketing request. By focusing on the supervisory review process, this rule further ensures customer confidentiality by making supervisors responsible for preventing the mistakes of lower level marketing personnel.

Against this background, forbearance from the application of Rules 64.2009(a) and (c) will not lessen the level of consumer protection furnished by the CPNI rules.

C. Forbearance From the Application of Sections 64.2009(a) and (c) is Consistent With the Public Interest.

In addition to being unnecessarily duplicative, implementation of Rules 64.2009(a) and (c) will be unreasonably expensive. In particular, implementation of the "first screen" requirement of Rule 64.2009(a) requires carriers to re-program their customer service software at great cost.

As explained by 360° Communications Company earlier in this proceeding, many customer data bases are designed to allow access to customer's records through several screens.[46]

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[46] *See* Petition for Forbearance or Reconsideration and Clarification of 360° (Continued...)

In order to comply with the mandate of Rule 64.2009(a), carriers would be required to add flags to every computer screen that related to customers' records. This would require considerable expenses for implementation because the entire system would have to be re-engineered. Furthermore, unlike the companies that were subject to the Computer III requirements, CMRS carriers have never been subject to CPNI regulations. Even worse, implementation of the "electronic audit trail" requirement of Rule 64.2009(c) requires carriers to re-write their customer support software *and* maintain a huge volume of electronic data for which there is no business purpose.

Because each carrier has unique customer service databases, and many carriers have a number of different databases, a "one-size-fits-all" approach is technically impractical, and economically inefficient. Thus, the Commission should avoid establishing these inflexible, expensive requirements and allow carriers the flexibility to engineer their own software solutions that will meet the CPNI requirements.

The Commission should also forbear from applying Rules 64.2009(a) & (c) because they will create additional Year 2000 compliance efforts for carriers. In a recent speech, Commissioner Powell explained that "the FCC takes very seriously its responsibility to work closely with the communications industry to ensure that the year 2000 challenge is successfully met."[47] The Commission should demonstrate this concern by avoiding the placement of regulatory requirements on carriers that will exacerbate the year 2000 problem. CPNI rules that require carriers to make even the most modest network modifications will have a negative impact

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(...Continued)
Communications Company, CC Docket 96-115 (filed May 26, 1998).

[47] Opening Statement of FCC Commissioner Michael K. Powell Before The Subcommittee (Continued...)